Calendar No. 132

100TH CONGRESS *1st Session*	SENATE	REPORT 100-78

PROMPT PAYMENT ACT AMENDMENTS OF 1987

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

together with

ADDITIONAL VIEWS

TO ACCOMPANY

S. 328

TO AMEND CHAPTER 39 OF TITLE 31, UNITED STATES CODE, TO CLARIFY AND STRENGTHEN THE PROMPT PAYMENT ACT OF 1982

JUNE 19, 1987.—Ordered to be Printed

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REPORT
100-78

THE PROMPT PAYMENT ACT AMENDMENTS OF 1987

JUNE 19, 1987.—Ordered to be printed

Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 328]

The Committee on Governmental Affairs, to which was referred the bill (S.328) to amend chapter 39 of title 31, United States Code, to require the Federal Government to pay interest on overdue payments, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

I. PURPOSE

The purpose of S. 328, the Prompt Payment Act Amendments of 1987, is to clarify and strengthen the Prompt Payment Act of 1982, Public Law 97-177 (codified at chapter 39 of title 31, United States Code), to attain Congressional objectives of fostering timely payments to those furnishing supplies, services, and construction through the Federal procurement process.

II. BACKGROUND AND NEED FOR LEGISLATION

A. THE PROMPT PAYMENT ACT OF 1982

1. The Problem—Late Payments to Government Contractors

The Prompt Payment Act of 1982 was passed by the Congress in 1982 to improve the Government's dismal record of untimely payments to its contractors, a situation that had steadfastly resisted

administrative resolution. The small business community was especially hard hit by the financing costs resulting from delayed payments.

Because of the steady stream of complaints from government contractors, especially small business government contractors, the General Accounting Office (GAO) conducted a comprehensive review of the Government's billpaying practices. Its report issued in February 1978 (FGMSC 78-16; 24 February 1978) confirmed that Government contractors faced a severe late payment problem. GAO found that almost 40 percent of contractor invoices were paid late, that is, after 30 days of receipt of invoice by the agency.

GAO specifically noted that delayed payments cause harm to contractors' cash flow, often requiring them to incur financing costs to cover the amounts receivable from the Government. The report concluded:

> Projecting the late payment results shown in GAO's sample (for the 6-month period covered) to total Federal procurements, GAO estimates that contractors might have incurred at least $30 million in interest costs to provide money tied up in overdue bills.

Government contractors were incurring an estimated $60 million dollars in financing costs to cover delayed Government payments.

The GAO also noted that delayed Government payments were harming the Government as well as its vendors in several ways. First, delayed payments were making the Government a less attractive customer, thus reducing the number of competitors. Successful commercial products vendors, in particular, were entering the Government market less frequently. This deprived the buying agencies of their more competitive pricing and the advanced technology driven by the commercial marketplace. Second, increasing numbers of vendors were inflating their prices to the Government in anticipation of delayed payments, with their attendant financing costs. Third, agency mismanagement of their billpaying activities was causing them to lose the savings to be realized from "fast pay" discounts offered by many vendors, especially commercial products vendors. The GAO was also found that some agencies overcame this problem for the Government by merely taking the "fast pay" discount after the expiration of the discount period, causing many vendors to refrain from offering such discounts on future Government work.

2. Remedial Legislation Before the Committee on Governmental Affairs

With the complaints of the small business community confirmed by the GAO, Congress set to work to remedy the situation. Senator Sasser introduced S. 30, the "Late Payment Act of 1981" on January 5, 1981. The Chairman (Mr. Danforth) and Ranking Minority Member (Mr. Chiles) of the Governmental Affairs Committee's Subcommittee on Federal Expenditures, Research and Rules then focused on the issue. On May 6, 1981, they introduced S. 1131, the "Delinquent Payment Act of 1981, along with 22 original cosponsors. Given the strong support of a broadly based industry coalition, the Coalition for Prompt Pay, and the persistence of Senators

Danforth and Chiles, S. 1131 moved steadily forward despite the steadfast opposition of OMB and the procuring agencies. A companion measure, H.R. 4709, the "Prompt Payment Act", concurrently was moving through the House under the leadership of Representatives Jack Brooks and Frank Horton, Chairman and Ranking Minority Member of the Committee on Government Operations, with strong bipartisan support. S. 1131 was finally signed into law on May 21, 1982, and became effective on October 1, 1982.

3. A Summary of the 1982 Act's Provisions

The Prompt Payment Act of 1982 (Public Law 97-177, codified at Chapter 39 of Title 31, United States Code) statutorily establishes payment terms for Government contractors providing supplies, services or construction to a Federal agency, if the individual contract does not contain a specific payment term. The Act specifies that payment be made:

(a) 30 days after receipt of a "proper invoice" at the agency's designated payment office, or the date on which the agency "accepts" the property or service, whichever is later;

(b) 10 days after the date of delivery of perishable agricultural commodities, as defined by the Perishable Agricultural Commodities Act of 1930; and

(c) 7 days after the date of delivery of meat or meat food products, as defined by the Packers and Stockyards Act of 1921, and poultry products.

Payment is considered made on the date of issuance of the Government's check, not on the date of receipt of that check by the contractor.

If timely payments are not made in accordance with the specific payment terms of a contract or in accordance with the Act, the agency is required to pay the contractor a late payment interest penalty. The interest rate is established by the Treasury twice a year, and is the same rate used under various statutes involving government contracting, e.g., the Contract Disputes Act of 1978. The Act specifies that the late payment interest penalty must be paid from the funds appropriated for the program which incurred the penalty.

Given the Government's very poor bill paying record at the time of the Act's passage, the Office of Management and Budget (OMB) convinced the House to include in the Act "grace periods", to avoid the agencies having to pay a very large number of small late payment interest penalties, with the attendant administrative costs, while they converted their bill paying systems to meet the Act's requirements. Under the Act's "grace period" provision, an agency may pay late and still avoid incurring a late payment interest penalty, if payment is made within the specified "grace periods". The "grace periods" specified in the Act are as follows:

(a) 3 days for meat and poultry;

(b) 5 days for perishable agricultural commodities; and

(c) 15 days for all other supplies, services or construction.

If the payment is not made by the expiration of the "grace period", the late-payment interest-penalty due to the contractor accrues from the payment due date, not the end of the grace period. For example, with a commercial item of supply, an agency has a total

of 45 days to make payment without incurring a late payment interest penalty, but if payment is not made by the 45th day, the interest due the contractor is calculated from the 31st day.

The Act also addresses the circumstances under which the Government may take advantage of "fast pay" discounts offered by some Government contractors, especially commercial products vendors. For example, a contractor may permit the agency to deduct 2 percent of the total invoice, if payment is made in, for example, 15 days, rather than the Act's normal 30 days. Under the Act, the Government is expressly prohibited from taking a "fast pay" discount after the expiration of the contractor's specified discount period. If the agency takes the "fast pay" discount after the expiration of the specified discount period, the Act entitles the contractor to a late payment interest penalty on the improperly taken discount.

If a contract authorizes partial deliveries or other partial contract executions, and payment for such partial performances, the Act requires that interest be paid on these contract payments, if they are not timely made in accordance with the contract's payment provisions. Since the Federal Acquisition Regulation (FAR) has not been modified to implement the Prompt Payment Act, it is not uncommon to find supply contracts which permit partial deliveries, but are silent as to agency payment terms for such partial deliveries. Under these circumstances, agencies maintained that the Act's requirements were not met, and therefore the contractor is not entitled to a late payment interest penalty even for payments exceeding the general 30-day standard. Further, almost all agencies maintain that progress payments, including those for construction, are not payments for partial performance, but are mere Government financing tools, and are thereby not subject to the Act's protections. This position is founded upon guidance in OMB Circular A-125 (Prompt Payment), which constitutes the principal regulatory guidance to the agencies.

A "proper invoice" is needed for a contractor to get paid. The standards for a "proper invoice" are specified in OMB Circular A-125. The Act requires that a contractor be given notice of an improper invoice within 15 days of receipt of the invoice by the agency. The "payment clock" running against the agency is stopped until the contractor submits a "proper invoice". When the contractor resubmits its invoice, and it meets the standards of a "proper invoice", the payment clock is restarted.

Having reviewed the protections which the Act accords to contractors, it is important to note that there are two major limitations on the reach of the Act's protections. First, the Prompt Payment Act does not apply to any contract payment that is subject to a "dispute" between the Government and the contractor as to whether the contractor has performed in accordance with the terms of its contract. Second, the Act does not apply to contracts awarded by recipients (e.g., state or local governments, universities, nonprofit organizations) of various forms of federal assistance, grants, cooperative agreements, loan guarantees, and the like. The Act applies only to direct Federal procurement contracts.

4. Impact of the Prompt Payment Act Since 1982

Government contractors, small businesses, as well as large firms, have had four complete fiscal years of experience with agency billpaying practices subject to the Prompt Payment Act. This experience has been closely monitored by the Coalition for Prompt Pay, and by many of its member associations. This long-term monitoring effort leads to two conclusions: First, that the Prompt Payment Act has dramatically improved the Government's billpaying practices from the situation that existed prior to enactment; and second, that agencies have exploited ambiguities in the Act and devised other interpretational strategems to strip away the Act's protections in an ever growing number of cases. The impetus for this unwanted agency behavior can be found in the Act's requirement that late payment interest penalties be paid from agency program funds, and secondly, to avoid OMB management pressures to hold down the number and dollar value of interest penalties paid.

B. IMPLEMENTATIONAL PROBLEMS IN THE 1982 ACT ARE IDENTIFIED

1. The Small Business Community Calls for Action

Given the years of billpaying experience under the Act and the continuing problems faced by small business Government contractors, the small business community began to call for oversight hearings and consideration of amendments to remedy persistent problems in the application of the 1982 Act. For example, the Small Business Committee's National Advisory Council considered the issue of the implementation of the Prompt Payment Act during its meeting on October 25, 1985. It adopted a resolution which cataloged many of the most serious implementational problems, and called for oversight hearings and remedial legislation. [Committee Print 99-102]

Several Congressional Committees began to review the problem. The Committee on Small Business initiated the oversight effort requested by the small business community during the 99th Congress. Two full days of oversight hearings were held. A field hearing was conducted in Richmond, Virginia on December 2, 1985, followed by a Full Committee hearing on June 19, 1986. 623 pages of printed hearing record resulted.

During the field hearing, representatives of small firms providing supplies, an array of services, and construction to various Government agencies provided testimony. A very extensive statement presented by the Prompt Pay Coalition expressed three basic themes. First, the Prompt Payment Act had substantially improved the billpaying practices of those executive agencies which are subject to its provisions. Second, many agencies had devised various ploys, based on ambiguities in the Act, which permitted them to pay late without incurring late payment interest penalties, principally by delaying the start of the payment clock. Third, agency implementing regulations restricted the Act's application, and thus its protections, with regard to certain types of payments due to contractors, most notably, construction progress payments, and partial and periodic payments under supply and service contacts. Agency testimony was received from Navy personnel representing Defense

agency experience and GSA representatives on behalf of the civil agencies.

During the Full Committee hearing on the implementation of the Prompt Payment Act, testimony was received from 13 witnesses, principally representing small business Government contractors. Many additional statements were submitted for the record.

Testimony was presented on behalf of the Prompt Pay Coalition, the National Federation of Independent Business (NFIB), the Small Business Legislative Council (SBLC), the Associated General Contractors of America (AGC), the American Subcontracting Association (ASA), and others. Most of this testimony followed the themes of the previous field hearing, but expanded the problems described to indicate concern on a national scope. OMB's Deputy Associate Administrator for Financial Management presented a statement from the OMB Director. This hearing also developed one additional issue of substantial significance: whether the Prompt Payment Act should be amended to provide protection to subcontractors under Federal construction contracts. Testimony from the witnesses representing ASA and the Associated Specialty Contractors (ASC) strongly urged such an amendment to the Act. Support for such an amendment was also included in the testimony of the witnesses representing the Prompt Pay Coalition, NFIB, and SBLC. AGC's witness opposed such an amendment.

2. GAO Reports on Implementation of the Act

House Government Operations Committee Chairman, Jack Brooks on March 21, 1985 requested the GAO to conduct a review of the Act's implementation. GAO's report, entitled *Prompt Payment Act: Agencies Have Not Fully Achieved Available Benefits* [GAO/AFMO 86-69], was issued on August 28, 1986 and confirmed most of the problems presented during the Senate hearings. It's principal findings are:

(a) approximately 24 percent of invoices are paid late;

(b) only one of every six late payment interest penalties owed were paid as required by the Act;

(c) 18 percent of the invoices were paid during the "grace periods";

(d) "early payment" discounts improperly taken, with no subsequent repayment or interest penalty to the vendor;

(e) inaccurate reporting of agency performance under the Act by OMB; and

(f) need for implementation of the Act through the Government-wide Federal Acquisition Regulation.

3. 1986 White House Conference on Small Business—Recommendation No. 32

The problems regarding the implementation of the Prompt Payment Act were discussed by many small business owners during the State and regional meetings that preceded the White House Conference on Small Business, which was held August 17-21, 1986. Implementation of the Prompt Payment Act was one of the conference's agenda items, as a result of resolutions adopted at these preparatory State conferences. A resolution calling for vigorous en-

forcement of the 1982 Act and suggesting a series of amendments finished among the top 40 recommendations from an agenda of over 400 issue items.

The text of Recommendation No. 32, pertaining to the Prompt Payment Act of 1982 is as follows:

> 32. Prompt pay legislation should be extended to cover postal service and federally assisted procurement and strengthen through an amendment to the 1982 Prompt Payment Act to eliminate the fifteen day grace period; require automatic payment of interest penalties; more clearly define that the entire payment process, including acceptance, must occur within 30 days; include progress payments and retainage; and require prime contractors to pay their sub-contractors within seven days after receiving payment from the government or incur interest payment penalties. In addition, when the Government pays the prime contractors late, interest payments shall flow through from prime contractors to sub-contractors on a pro-rata basis. The prompt payment act shall be vigorously enforced by all branches of government.

C. LEGISLATIVE ACTION IN THE 99TH CONGRESS—S. 2479

During the Second Session of the 99th Congress, the Governmental Affairs Committee considered similar legislation, S. 2479, the "Prompt Payment Amendments of 1986." S. 2479 was introduced by Senator Trible on May 21, 1986. It was referred to the Committee on Governmental Affairs and its Subcommittee on Oversight of Government Management. The Subcommittee considered the legislation utilizing 623 pages of printed hearing record compiled by the Committee on Small Business. The Subcommittee also had the benefit of the hearing record compiled by the Subcommittee on Legislation and National Security of the House Committee on Government Operations, which conducted an oversight hearing on the implementation of the Prompt Payment Act on July 29, 1986.

The Oversight of Government Management Subcommittee considered S. 2479 and unanimously reported an amendment in the nature of a substitute, which, among other changes added a section extending the Act's protection to subcontracts under construction contracts. After further consideration by the Full Committee, S. 2479 was marked-up on October 2, 1986. The Committee unanimously approved the amendment in the nature of a substitute. S. 2479 was passed by the Senate by unanimous consent on October 15, 1986, but was not enacted because Congress was in the final days of the 99th Congress and no companion measure was considered in the House of Representatives.

III. History of S. 328

On January 20, 1987, Senator Sasser introduced S. 328, the "Prompt Payment Act Amendments of 1987". The bill was introduced with 56 original cosponsors. On the date the bill was reported by the Committee on Governmental Affairs, it enjoyed even stronger bipartisan support with 82 cosponsors, including all mem-

bers of the Committee on Governmental Affairs and all but one member of the Committee on Small Business.

The bill:

Clarifies the starting point of the Act's "payment clock" by more clearly defining "receipt of invoice" and requiring the Government to announce prior to contract if formal "acceptance" will take longer than 5 days from the date of actual delivery of goods or performance of services by the contractor;

Makes explicit the Act's intent that late payment interest penalties be paid automatically and provides for increased penalties in the event that agency personnel attempt to withhold a late payment interest penalty due to a contractor;

Phases-out the fifteen-day "grace period", during which the Act allows the Government to pay late without incurring a late payment interest penalty;

Makes explicit the Act's application to construction contract progress payments and extends the Act to cover the late disbursement of amounts retained by the Government during the performance of a federal construction contract, once the project has been accepted;

Clarifies the Act with respect to its application to payments for the periodic delivery of supplies or the periodic performance of services authorized under many Government contracts;

Requires Government construction contractors to include a payment provision in their agreements with their various subcontractors, which provides for payment in accordance with the prevailing industry standard and requires the payment of a late payment interest penalty to the subcontractor at the same rate applicable between the prime contractor and the Government, if the prime contractor does not make payment in accordance with its subcontractor;

Clarifies the Act to prohibit the Government from taking "early payment" discounts after the expiration of the contractor's specified discount period;

Makes explicit the Act's coverage of contractors selling to the U.S. Postal Service;

Improves the Act's reporting requirements to assure that Congress receives from OMB an accurate and complete picture of the Act's implementation by the various agencies; and

Requires the implementation of the Act through the Government-wide Federal Acquisition Regulation (FAR), which has been delayed four years and which GAO found was a continuing cause of may payment problems.

Under the direction of Chairman Glenn, on March 19, 1987, the Committee conducted a hearing on S. 328. Extensive testimony was received from witnesses representing a broad array of firms furnishing supplies, services and construction to the Government. Small firms, in particular were afforded the opportunity to present their views to the Committee.

Testimony was received from representatives of the General Accounting Office who presented the findings of their review of the Act's implementation. These views had been compiled as a result of a request by the Chairman of the Subcommittee on Legislation and National Security of the House Government Operations Commit-

tee. This extensive GAO report, entitled *Prompt Payment Act: Agencies Have Not Fully Attained Available Benefits* [GAO/AFMO 86-69; 28 August 1986] confirmed many of the problems cited by the business community. GAO testified in favor of S. 328, maintaining that its provisions addressed many of the wide-spread and persistent problems discovered during the conduct of their review of the Act's implementation by the various Executive agencies.

Testimony was also received from the Deputy Director of the Office of Management and Budget. In a reversal of the Administration's position during the 99th Congress, OMB's witness expressed support for a legislative solution to the problems identified. In essence, S. 328 would provide a firm legislative foundation for many of the administrative improvements to agency implementation of the Act changes which OMB was currently considering. The Administration's witness stated opposition to only two provisions of the bill.

The Committee invited testimony from the Chief Counsel for Advocacy of the Small Business Administration who by statute, is charged with being the independent voice of small business within the Administration. He strongly supported all but one provision of S. 328.

The Committee kept the record open for an extended period to receive additional statements for the record and other supplemental materials. An extensive hearing record was compiled, especially regarding the bill's provision extending the Act's protections to subcontractors on federal construction projects. It is notable that the hearing record includes submissions from representatives of large firms as well as small businesses, which confirms the Committee's belief that the issue of timely payments is important to firms of all sizes, who participate in the Federal procurement process.

On May 19, 1987, the Committee considered S. 328 and unanimously adopted by voice vote an amendment in the nature of a substitute offered by Senator Sasser. Based upon recommendations received from GAO, OMB, and the business community, the substitute contained several significant improvements to the original bill, including: (a) further specificity concerning receipt of invoice and the timing of Government acceptance, the two events that trigger the start of the "payment clock" under the Prompt Payment Act; (b) acceleration of the phase-out of the Act's "grace periods", by one full year; (c) adding a provision which prevents an agency from absolving itself from the Act's requirements due to a temporary unavailability of funds to make timely contract payments, a generic solution to a position taken in 1986 by the Commodity Credit Corporation; (d) making explicit the Act's coverage of contracts renewed or contract options exercised after the effective date of the amendments; and (e) further improvements to OMB's reporting requirements to assure that Congress gets accurate information concerning the Act's implementation by the Executive agencies.

The substitute also clarified section 7 (Payment Clause for Subcontracts Under Construction Contracts) with additional statutory language derived from policies previously enunciated only in the section-by-section analysis that accompanied the bill at introduc-

tion. The additional statutory language explicitly addresses some of the key issues surrounding this provision, including:

(a) protecting the Government from becoming involved in the resolution of performance or payment disputes between the prime contractor and its subcontractors;

(b) making clear that the prime contractor retains the right to manage its subcontractors through the use of the traditional contract administration tools of withholding and retainage;

(c) making clear that any amounts withheld or retained from a subcontractor by the prime contractor shall remain in the hands of the Government until such times as the prime contractor determines that the subcontractor is entitled to these funds; and

(d) leaving unimpaired any contractual, administrative, or judicial remedies presently available to contractors or subcontractors for the resolution of payment disputes.

The text of S. 328, as reported, is as follows:

SHORT TITLE

SECTION 1. This Act may be cited as the "Prompt Payment Act Amendments of 1987".

CONGRESSIONAL FINDINGS

SEC. 2. The Congress finds that—

(1) the billpaying practices of most Federal Government agencies generally have improved, with certain exceptions, after four years of experience under the Prompt Payment Act (codified in chapter 39 of title 31, United States Code);

(2) the improvement in such billpaying practices has resulted in fairer treatment of contractors who furnish supplies, services, or construction to the Federal Government, especially small businesses;

(3) nonetheless, many contractors who deal with the Federal Government continue to experience persistent problems of untimely Government payments as a result of—

(A) the failure to implement the provisions of the Prompt Payment Act through the Government-wide Federal Acquisition Regulation;

(B) the implementation of the provisions of the Prompt Payment Act in a manner that denies the Act's protections in cases of certain contract payments, such as progress payments for work satisfactorily performed under construction contracts and payment of amounts which have been retained by a Federal Government agency during the performance of construction contracts and are to be released upon final acceptance of the construction work by the agency;

(C) the unlimited time presently afforded Federal Government agencies formally to accept supplies delivered or services performed by contractors, which may be improperly used by such agencies to deny late payment interest penalties to contractors delivering such supplies or per-

forming such services in a timely manner as prescribed by the contract;

(D) the implementation of the provisions of such Act in a manner which has permitted Federal Government agencies to take discounts for early payment months after the expiration of the discount period specified in the contractor's invoice;

(E) the failure of the Act explicitly to require Federal Government agencies automatically to pay late payment interest penalties due to contractors;

(F) the absence of incentives effectively to dissuade Government employees from attempting to withhold late payment interest penalties which contractors are entitled to receive;

(G) the continued availability of certain payment grace periods which affords Federal Government agencies the opportunity to pay their bills late without incurring any late payment interest penalty and, thus, unilaterally to extend the payment due date upon which the contractors have based their contract prices;

(H) the failure of Federal Government agencies to implement the requirement in the Act to pay, during the contract period, for the periodic delivery of supplies or the periodic performance of services if permitted by the contract; and

(I) the failure of the Act explicitly to protect contractors doing business with the United States Postal Service;

(4) the Federal Government will realize substantial benefits if Government construction contracts require Government contractors to pay their subcontractors and suppliers in a timely manner, in accordance with prevailing industry standards, or be subject to the same late payment interest penalties prescribed in the Act; and

(5) a strengthening of the provisions of the Prompt Payment Act, and its vigorous enforcement, is a key recommendation made to the President and the Congress by the delegates to the 1986 White House Conference on Small Business.

DEFINITIONS AND APPLICATION

SEC. 3. (a) Section 3901(a)(4) of title 31, United States Code, is amended to read as follows:

"(4) the head of the agency is deemed to receive an invoice on the later of—

"(A) the date on which the place or person designated by the agency to first receive such invoice actually receives a proper invoice; or

"(B) on the fifth day after the date on which, in accordance with the terms and conditions of the contract, the property is actually delivered or final performance of the services is actually completed, as the case may be, unless—

"(i) the agency has actually accepted such property or services before such fifth day; or

"(ii) the contract specifies a longer period for agency acceptance of the property or services.".

(b)(1) Section 3901 of such title is further amended by adding at the end the following new subsection (c):

"(c) This chapter, except section 3906 of this title, applies to the United States Postal Service. However, the Postmaster General shall be responsible for issuing the implementing procurement regulations, solicitation provisions, and contract clauses for the United States Postal Service.".

(2) Section 410(b) of title 39, United States Code, is amended by inserting after clause (8) the following new clause (9):

"(9) Chapter 39 of title 31.".

INTEREST PENALTIES: REDUCTIONS IN GRACE PERIOD; INCREASED PENALTIES; OBLIGATION TO PAY PENALTIES

SEC. 4. (a)(1)(A) Section 3902(b) of title 31, United States Code, is amended by striking out "16th" in clause (3) in such sentence and inserting in lieu thereof "8th".

(B) Effective with respect to payments made on or after October 1, 1989, section 3902(b) of title 31, United States Code, is amended by striking out the second sentence.

(b) Section 3902 of such title is further amended by redesignating subsections (c) through (e) as subsections (e) through (g), respectively, and by inserting after subsection (b) the following new subsections (c) and (d):

"(c)(1) Any amount of an interest penalty of $1.00 or more which is owed a business concern under this section shall be paid without regard to whether the business concern has requested payment of such penalty.

"(2) If a business concern—

"(A) is owed an interest penalty by an agency;

"(B) is not paid the interest penalty in a payment made to the business concern by the agency on or after the date on which the interest penalty becomes due;

"(C) is not paid the interest penalty by the agency within 10 days after the date on which such payment is made; and

"(D) makes a written demand, not later than 40 days after the date on which such payment is made, that the agency pay such a penalty,

such business concern shall be entitled to receive an interest penalty equal to twice the amount of the interest payment that would otherwise be due.

"(d) The unavailability of funds to make a timely payment due for property or services does not relieve the head of an agency from the obligation to pay interest penalties under this section.".

INTEREST PENALTIES ON PROGRESS PAYMENTS AND RETAINED AMOUNTS UNDER CONSTRUCTION CONTRACTS

SEC. 5. Section 3903 of title 31, United States Code, is amended—

(1) by striking out clause (4);

(2) by redesignating clause (5) as (6); and

(3) by inserting after clause (3) the following new clause (4):

"(4) in the case of a construction contract, provide for the payment of interest on—

"(A) any progress payment due under the contract for—

"(i) a period of more than 7 days; or

"(ii) a longer period if the contracting officer determines that the prevailing practice in private construction contracts is to provide such longer payment period; and

"(B) any amount which has been retained during the performance of the contract and are due to be released to the contractor after final acceptance of the construction, if such retained amount is not paid to the contractor by the required payment date;".

PERIODIC PAYMENTS UNDER SUPPLY AND SERVICE CONTRACTS

SEC. 6. Section 3903 of title 31, United States Code, as amended by section 5, is further amended by inserting after clause (4) the following:

"(5) provide for periodic payments, in the case of a supply or service contract which authorizes periodic payments during the contract period, upon—

"(A) submission of an invoice for supplies delivered or services performed during the contract period, if an invoice is required by the contract; and

"(B) either—

"(i) acceptance of the supplies or services by an employee of an agency authorized to accept the supplies or services; or

"(ii) certification, by such an employee, that the performance covered by the payment conforms to the terms and conditions of the contract.".

PAYMENT CLAUSE FOR SUBCONTRACTS UNDER CONSTRUCTION CONTRACTS

SEC. 7. (a) Chapter 39 of title 31, United States Code, is amended—

(1) by redesignating sections 3905 and 3906 as 3906 and 3907, respectively; and

(2) by inserting after section 3904 the following:

"§ 3905. Payment clause for subcontracts under construction contracts

"(a) Each construction contract awarded by an agency shall include a clause that requires the prime contractor to include, in each subcontract for property or services entered into by the prime contractor and a subcontractor (including a material supplier) for the purpose of performing such construction contract, a payment clause which obligates the prime contractor—

"(1) to pay the subcontractor promptly (as determined in accordance with the prevailing industry standard) out of such amounts as are paid to the prime contractor by the agency for work satisfactorily performed by the subcontractor under that contract; and

"(2) to pay to the subcontractor an interest penalty on amounts due in the case of each payment not made in accordance with such payment clause—

"(A) for the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

"(B) computed at the most current rate of interest that has been determined by the Secretary of the Treasury for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) and published by the Secretary in the Federal Register.

"(b) In addition to the payment clause required by subsection (a), a prime contractor may negotiate and include in the subcontract a provision which permits the prime contractor to make a determination, before making application to the agency for a payment for work performed by a subcontractor, that—

"(1) all or part of the subcontractor's request for payment may be withheld for good cause; and

"(2) a specified percentage of any progress payment otherwise due to the subcontractor may be retained for the protection of the prime contractor and be paid to the subcontractor within seven days after such amount is released to the prime contractor by the Government.

"(c) A prime contractor may not request payment from the agency of any amount withheld or retained in accordance with subsection (b) until such time as the prime contractor has determined and certified to the agency that the subcontractor is entitled to the payment of such amount.

"(d) A dispute between a prime contractor and a subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under a subcontract clause conforming to the standards of subsection (a) does not constitute a dispute to which the United States is a party. The United States may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

"(e) Except as provided in subsection (d), this section shall not limit or impair any contractual, administrative, or judicial remedies otherwise available to a subcontractor or a contractor in the event of a dispute involving late payment or nonpayment by a prime contractor.

"(f) A prime contractor's obligation to pay an interest penalty to a subcontractor pursuant to the payment clause included in a subcontract under subsection (a) may not be construed to be an obligation of the United States. A contractor may not obtain reimbursement from the United States for such interest penalty. A contract modification may not be made for the purpose of providing reimbursement of such interest penalty. A cost reimbursement claim may not include any amount for reimbursement of such interest penalty.".

(b) The table of sections at the beginning of such chapter is amended by striking out the items relating to sections 3905 and 3906 and inserting in lieu thereof the following:

"3905. Payment clause for subcontracts under construction contracts.
"3906. Reports.
"3907. Relationship to other laws.".

LIMITATIONS ON DISCOUNT PAYMENTS

SEC. 8. Section 3904 of title 31, United States Code, is amended by inserting after the first sentence the following: "For the purpose of the preceding sentence, the specified time shall be calculated from the date the invoice under the contract is received by the office or employee of the agency designated by the agency to first receive such invoice until the date of payment.".

REPORTS

SEC. 9. Section 3906(a) of title 31, United States Code (as redesignated by section 7(a)(1), is amended to read as follows:

"(a)(1) By the 60th day after the end of the fiscal year, the head of each agency shall submit to the Director of the Office of Management and Budget a report on the agency's payment practices during that fiscal year, including a description of the extent to which those practices satisfy the requirements of this chapter.

"(2) In addition to such other information as may be required by the Director, the report required by paragraph (1) shall include—

"(A) the number, dollar value, and percentage of invoices for which interest or other late payment penalties were paid, the amount of such late payment interest and other penalties, and the reasons the interest penalties were not avoided by prompt payment; and

"(B) the number, dollar value, and percentage of invoices paid after the required payment date without payment of an interest penalty or other late payment penalty, and the reasons no obligation to pay such penalties was incurred with respect to such invoices or no amount for such penalties were included in the payments of such invoices.".

IMPLEMENTATION THROUGH THE FEDERAL ACQUISITION REGULATION

SEC. 10. (a) The Federal Acquisition Regulation shall be modified to provide appropriate solicitation provisions and contract clauses that implement chapter 39 of title 31, United States Code, and the regulations prescribed under section 3903 of such title.

(b) The solicitation provisions and contract clauses required by subsection (a) shall include the following matters:

(1) Authority for a contracting officer to specify for a contract or class of contracts a specific payment period, which—

(A) in the case of payments for commercial items or services, is similar to the payment period of periods permitted in prevailing private industry contracting practices;

(B) in the case of payments for noncommercial items and services, does not exceed 30 days unless the circumstances of the procurement action require a longer period for payment; and

(C) in the case of progress payments under construction contracts, does not exceed 7 days, unless the contracting officer determines that the prevailing practice in private construction contracts requires a longer payment period.

(2) Requirements to make periodic payments, in the case of a supply or service contract which authorizes periodic payments during the contract period, upon—

(A) submission of an invoice for supplies delivered or services performed during the contract period, if an invoice is required by the contract; and

(B) either—

(i) acceptance of the supplies or services by an employee of the contracting agency authorized to accept the supplies or services; or

(ii) certification, by such an employee, that the performance covered by the payment conforms to the terms and conditions of the contract.

(3) A conclusive presumption, for the purposes of determining timely payment, that the Federal Government has accepted property or services by the fifth day after the date on which, in accordance with the terms and conditions of the contract, the property is delivered or final performance of the services is completed, unless the circumstances of the procurement require a longer period for acceptance by the Federal Government and such longer period is specified in the solicitation for such contract.

(4) The limitation that the Federal Government may take a discount offered by a contractor for early payment by the Federal Government only in accordance with the time limits specified by the contractor.

(5) The requirements of section 3902(c) of title 31, United States Code.

(c) The regulations required by subsection (a) shall be published as proposed regulations for public comment as provided in section 22 of the Office of Federal Procurement Policy Act (41 U.S.C. 420) within 120 days after the date of the enactment of this Act.

EFFECTIVE DATES

SEC. 11. (a) Section 3(a)(2) and the amendments made by sections 3(a)(1), 4, 5, 6, 7, and 8 shall apply to payments under contracts awarded, contracts renewed, and contract options exercised during or after the first fiscal quarter which begins more than 90 days after the date of the enactment of this Act.

(b) The amendments made by section 3(b) shall apply to payments under contracts awarded on or after October 1, 1988.

(c) The amendment made by section 9 shall apply to the report required by section 3906 of title 31, United States Code, for each fiscal year beginning after September 30, 1987.

IV. MAJOR PROVISIONS OF THE LEGISLATION

Section 3. Definitions and Application

A. CIRCUMSCRIBING UNLIMITED TIME FOR GOVERNMENT ACCEPTANCE

Under the Prompt Payment Act, the starting point for the "payment clock" is the receipt of a proper invoice by the designated payment office or the date the supplies, services or construction are formally accepted by the Federal agency, whichever is later. Ac-

ceptance in government contract practice is distinct from simple delivery of supplies or the completing of the performance of a service. Under the Federal Acquisition Regulation (FAR), acceptance constitutes acknowledgement by the Government that the supplies or services (including construction) conform with the requirements of the contract; it is the point at which title passes to the Government. Given that the time of acceptance is solely in the hands of the federal agency, the agencies are also in control of the starting point of the payment clock.

The following example demonstrates the issue:

> The Federal Supply service of the General Services Administration . . . has granted itself an additional full seven days for acceptance of supplies. These seven days are imposed on all companies regardless of the actual time the agencies take to process receiving papers. Added to the 45 interest-free days already allowed by law, this now gives the agency a period of 52 days to make payment and avoid the payment of interest.

Section 3(a) of the bill amends the acceptance provision of the Act by specifying that, for the purpose of determining timely payment, acceptance is deemed to have been accomplished five days after delivery (or final performance of a service, including construction), unless the contract solicitation specifies a longer period for acceptance. This provision was modified during Committee consideration to reflect that the "payment clock" is started by actual acceptance on the part of the Government, even if actual acceptance takes place prior to the expiration of the five day "constructive" acceptance period. In the Committee's view, this amendment preserves the government's right to assure itself adequate time to accomplish acceptance, but also assures that it will inform the contractor of acceptance periods exceeding five days when the contractor is seeking to compete for the contract rather than when we or she is seeking to get paid for work completed.

The implementing procurement regulations should strongly encourage that acceptance periods be kept to the minimum required based on experience. Contracting officers should be accorded the flexibility to prescribe an acceptance period that comports with the subject matter of the contract. For example, commercial items should require a shorter acceptance period than items fabricated to a Government design specification. Similarly, items which are inspected prior to shipment should be susceptible to acceptance shortly after delivery, since the Government will only need to verify quantities and conformity with any specialized packaging requirements. The Committee expects that this amendment will generally result in acceptance time periods being announced in the contract solicitation, thus permitting competing contractors to adjust their prices to account for the financing costs associated with exceptionally long acceptance periods.

Finally, the Committee emphasizes that the amendment does not compel the Government to pay for supplies or services (including construction) that it has not had the opportunity to inspect and actually accept. Rather, it merely lifts the financial burden of unexpected Government delay from the contractor by requiring the payment of interest. Payment of the contract price, and any accrued

interest penalties, will be payable only after actual acceptance of a proper invoice.

B. FIRST RECEIPT OF INVOICE IS DEFINED

Several witnessses noted during the Committee's hearing that under the Act's current language, a contract might require an invoice to be sent first to a contracting officer's technical representative (COTR) or auditing activity rather than to the designated payment office which will subsequently be responsible for actually issuing the payment. Michael Roush, testifying on behalf of the National Federation of Independent Business, reported that:

> Without a doubt the single most abused and ambiguous section of the current law relates to government "receipt" of a "proper" invoice. The date on which the designated payment office or finance center of the agency actually receives a proper invoice is the date the clock begins to tick in the payment process. Interest penalties begin accruing thirty days from that date, but frequently one to three months pass before an invoice works its way through the paperwork channels and officially reaches a "payment center."

The time an invoice is in the hands of these other designated agency players is not counted for the purpose of establishing whether timely payment has been made or a late payment interest penalty is due to the contractor. According to Roush, "these delays in the 'formal' receipt of any invoice have caused delays of thirty to ninety days."

Because of this problem, the sponsors of S. 328 propose to amend 31 U.S.C. 3901(a)(4)(A) to require an agency to measure the timeliness of a payment from the time it, or a designated agent, first receives invoice if the "payment clock" is triggered by receipt of invoice rather than acceptance. This provision was modified during Committee consideration to broaden the reach of the provision to encompass governmental and even non-governmental agents designated to receive invoices by the agency letting the contract.

C. EXPLICIT COVERAGE OF POSTAL SERVICE

The sponsors of the legislation that became the Prompt Payment Act (S. 1131 and H.R. 4709 in the 97th Congress) intended that the United States Postal Service (USPS) be covered by the Act's provisions. To attain that objective, the broad definition of "agency" found at Section 551(1) of Title 5 was used. A required amendment to the USPS's organic statute was not made, however. Although the Committee is informed that the USPS generally has adjusted its billpaying procedures and practices to comport with the Act's standards, the proposed amendment would statutorily assure USPS contractors the same protections accorded to contractors dealing with the departments and agencies of the Executive Branch by explictly covering the USPS. It should be noted that the amendment reserves to the Postmaster General the authority to implement the Act through the USPS's own procurement regulations.

In addition, the subsection exempts the USPS from reporting its compliance with the Act to the Office of Management and Budget, in recognition of its independent status. Nevertheless, the USPS is still required to maintain its own data concerning its billpaying performance in furtherance of effective cash management and to permit appropriate oversight by USPS senior management as well as the Congress.

Section 4. Interest Penalties: Reductions in Grace Period; Increased Penalties

A. ELIMINATION OF GRACE PERIODS

The 1982 Act includes a fifteen-day "grace period", during which an agency may pay a bill late without incurring any interest penalty. The "grace period" was included in the Act from the House bill (H.R. 4709) at the request of the Administration. The justification for the "grace period" was grounded in the argument that some mechanism was essential to protect the Government from the substantial administrative burden and expense anticipated from having to pay tens of thousands of small late payment interest penalties while the agencies adjusted their billpaying systems to the Act's standards.

Testimony from witnesses representing small business government contractors presented during the Committee's hearing called for the immediate elimination of the 15-day grace period noting that the substantial improvements in agency billpaying practices being reported by OMB during the first three fiscal years of experience under the Act virtually eliminated the basic rationale for a grace period. Calling the "grace period" "an abuse and a burden", Kenton Pattie, director of the Coalition for Prompt Pay, stated:

> The extra fifteen days in the Prompt Payment Act represents a unique privilege of government which undermines the perception of fair treatment for businesses.

John C. Rennie, testifying on behalf of National Small Business United and the Professional Services Council, noted:

> In essence, what the fifteen-day grace period does is to have small businesses subsidize the government by lending them interest-free money for those extra days.

Despite the strong sentiments from the small business community for immediate elimination of the fifteen-day grace period, Subsection (a) of Section 4 would eliminate it gradually. The bill initially reduces it to seven days, deferring elimination of all the specified grace periods until October 1, 1989. During Committee consideration of the bill, the effective date for the elimination of the grace periods was changed from October 1, 1990 to October 1, 1989 in response to testimony received from the Deputy Director of OMB during the Committee's March 19th hearing. Mr. Wright testified that OMB intended to try to eliminate the fifteen-day grace period "one year earlier than you have in the proposed legislation at this time".

The Committee amendment would eliminate all the grace periods. To do otherwise, would be to accord a less equitable standard

of treatment to the categories of products, meat and fresh fruits and vegetables, which are recognized as requiring quicker payment terms due to statutory requirements or prevailing commercial practice.

B. AUTOMATIC PAYMENT OF INTEREST AND DOUBLING OF INTEREST PENALTIES

Testimony from witnesses representing small business government contractors cite experiences in which they had to make a formal written demand for late payment interest penalties due, despite the Act's clear intent and the explicit direction to the agencies in OMB Circular A-125 (Prompt Payment) that such penalties are to be paid "automatically." During its review, GAO found that some payment centers even had "informal" local policies of generally requiring a contractor to make a demand for interest due on a late payment. The likely origin for this reluctance to pay interest can be found in the standard by which OMB measures agency performance under the Act: on the basis of the number of invoices upon which the agency paid a late payment interest penalty. As noted by GAO, this performance measure maintains strong organizational pressures to both pay invoices on time (the objective of the Act) and to avoid paying interest even when it is due (an unintended side-effect of the Act's current reporting requirement).

Subsection (c)(2) of Section 4 provides a countervailing pressure on payment center personnel who might be tempted to withhold payment of late payment interest penalties due contractors, so as to reduce the number of late invoices reported to OMB. Under the amendment, a contractor would become entitled to double any late payment interest penalty (not double the payment due for contract performance), if four conditions are met. First, the contractor must be entitled to a late payment penalty. Second, the agency must have actually made a payment to the contractor which did not include any late payment interest penalty. Third, the agency would have ten days from the date of its payment to the contractor to catch any inadvertent failure to pay the late payment interest penalty and to make such payment. Agency corrective action during the ten day period would eliminate the contractor's entitlement to the double interest penalty. And, finally, the contractor must make a written demand for the late payment interest penalty within forty days of the date of payment, thus limiting the Government's potential exposure under this provision.

The witness for the Coalition for Prompt Pay testified:

> The automatic payment of interest and the increased penalty for failure to comply . . . are fundamentally necessary for several reasons:
>
> (A) The vendor has no method of determining interest in advance since he or she does not know when the check will be issued by the agency.
>
> (B) Rebilling for interest is costly and burdensome to both the government (which has to process the new invoice) and to the company (which has to issue the invoice for an indefinite amount).

> (C) The interest rate is recalculated every six months and the government has much easier access to the current interest rate than does the vendor.

Given the strict requirements of the provision and the improved internal management controls in most automated payment centers, the double late payment interest penalty authorized by this amendment to the Act could only be expected to fall upon those who would deliberately try to avoid paying a late payment interest penalty, so they look "good" in their reports to OMB. The current incentive to withhold late payment interest penalties in order to avoid OMB criticism is counteracted by this provision of the bill. Under the proposed amendment such unacceptable behavior will put the payment center, or an individual payment clerk, at risk of looking twice as "bad" than if the contractor were automatically paid the interest penalty due under the Act.

During Committee consideration, a new subsection (d) was added to this Section. It makes explicit that the Act's protections are not abrogated merely because an agency is unable to make timely payments due to a temporary unavailability of funds. When funds become available, the contractor is entitled to whatever late payment interest penalty is due in addition to the payment due for contract performance.

This provision has its origins in actions taken in 1986 by the Commodity Credit Corporation (CCC) within the Department of Agriculture. CCC suspended application of the Prompt Payment Act for red meat purchases, when it was unable to make timely payment to its vendors as a result of having reached the ceiling of its borrowing authority. GAO reviewed the case and issued a legal opinion to Representative Glenn English of the House Government Operations Committee (B-223857; 27 February 1987). GAO's opinion stated that "CCC's subsequent refusal to pay any interest to contractors after funds became available and payment was made violated the Prompt Payment Act . . ." This provision would support the GAO's analysis and opinion.

Section 5. Interest Penalties on Progress Payments and Retained Amounts Under Construction Contracts

A. PROGRESS PAYMENTS

Despite explicit legislative history in the reports accompanying S. 1131 and H.R. 4709 that progress payments under construction contracts fall within the reach of the Prompt Payment Act's provision affording coverage to payments for partial executions if authorized by the contract (31 U.S.C. 3903(4)), most agencies have determined by regulation that construction progress payments are "payments . . . made solely for financing purposes", which are exempt from coverage under OMB Circular A-125 (Para. 8(c)), thus, refusing to pay late payment interest penalties. The testimony of M.R. Sullivan, Jr., representing the American Subcontractors Association, stated the result of this policy fairly succinctly:

> The government is asking the construction industry—primarily small businesses—to help finance its construction. Construction contractors are builders, not bankers.

> And when the government forces construction contractors to act as bankers, it will pay dearly for that service. . . . Contractors, of necessity, must recoup a portion of the negative cash flow created by late payments by increasing their prices to the government.

This section makes explicit the intent of the Act that progress payments under construction contracts are subject to the Act's protections. It would entitle a contractor to receive a late payment interest penalty, in the event of untimely Government payment.

The provision recognizes seven days as the prevailing industry standard in the private sector for payment of the prime contractor by the owner, i.e., the Government. It reserves to the Government the right, however, to specify a longer period in a contract solicitation upon demonstrating that such larger period is the prevailing practice for the type of construction being procured.

B. RETAINED AMOUNTS

Contracting officers are authorized by regulation to "retain" a percentage of a progress payment otherwise due a contractor upon making a specific finding concerning the timeliness of the contractor's performance, conformity with the contract specifications or for other good cause. The Committee believes that once such deficiencies have been corrected to the agency's satisfaction and the construction project has been accepted by the Government, the contractor is entitled to be paid these retained amounts as promptly as the final payment under the contract.

The section extends the Act's protection to amounts retained from progress payments paid to a contractor by the agency during the term of a construction contract. Under the amendment, an agency would be liable for a late payment interest penalty, if it fails to make timely release of retained amounts in accordance with the terms of the construction contract or within 30 days of acceptance whichever is later.

Section 6. Periodic Payments Under Supply and Service Contracts

Testimony received during the Committee's hearing reflected the fact that some agency buying personnel maintain that periodic payments authorized under some supply and many service contracts are not subject to the Act, and hence not entitled to interest penalties for late payment. Kenton Pattie, testifying for the Coalition on Prompt Pay, reported:

> One firm told me that the Navy will only contract with them if the company agrees to submit monthly statements. What this means is that some partial payments are stretched well beyond 30 days before the monthly bill is submitted by the vendor. This is a clear attempt by the Navy at getting around the partial payment provision this Committee and the Congress put in the Act.

The agency's assert this position on the basis of two arguments. First, they may maintain that such periodic payments are not payments for work performed, but rather "payments solely for financing purposes', which have been explicitly exempted from the Act's

protection under OMB Circular A-125. Or, second, they will avoid the Act's interest penalty on the basis that the contract does not include the "separate required payment dates" mentioned in the Act. Given that the FAR's "menu" of contract clauses was never modified to implement this among other provisions in the Prompt Payment Act, contractor's generally do not get paid interest penalties for late periodic payments.

Section 6 clarifies 31 U.S.C. 3903(4) with respect to the Act's application to various periodic payments. Under this provision, a vendor who had furnished items of supply or a service, accepted by the agency, would be entitled to a late payment interest penalty, if the agency failed to make payment in accordance with the payment terms of the contract, or within 30 days in the absence of a contractual payment term. This provision is not intended to alter the prompt payment of certain progress payments due under various cost-reimbursement type contracts, especially for major systems contracts awarded by the Department of Defense or the civilian agencies. The bill makes a corresponding modification in Section 10, which requires the promulgation of FAR coverage to implement the Act.

Section 7. Payment Clause for Subcontracts Under Construction Contracts

Section 7 of the bill adds a new section 3905 to the Prompt Payment Act, as codified, which extends the Act's protections to subcontractors under federal construction contracts. The Committee took this action in the belief that mandating the timely payment of subcontractors on federal construction projects will be beneficial to the Government in having its construction contracts performed in a timely manner at the lowest cost. The Committee also recognized that prescribing the minimum standards for the payment clause between a federal construction contractor and its various subcontractors will encourage more equitable treatment of subcontractors.

Subcontractors play a very substantial role in the accomplishment of federal construction projects. On federal construction, 80 percent of the work is done by subcontractors specializing in different trades. Late payment by prime contractors can negatively affect their ability to perform.

Improperly delayed payments from the prime contractor to its subcontractors will have the same serious adverse economic effects as delayed payments from the Government to the prime contractor. The unexpected reduction in cash flow makes it difficult to obtain needed supplies and equipment in adequate quantities, when required. The workforce may have to be reduced, further delaying the project. Furthermore, chronic delayed payment of subcontractors, resulting in substantial unanticipated financing costs, may tempt them to cut corners in performance in order to minimize losses. For example, the subcontractor may substitute materials of inferior quality for those specified.

Payment problems between the prime contractor and its subcontractors are also likely to generate protracted legal disputes. Such disputes will likely lead to delays in performance that ultimately work to the Government's detriment. The Government may also face increased upfront costs as subcontractors increase their bids in

anticipation of delayed payments from the prime contractor. Finally, the late payment problem may drive subcontractors from the federal construction market, thus reducing competition.

The testimony presented to both Committees also made a persuasive case that subcontractors cannot reasonably seek adequate protection against unwarranted payment delays by prime contractors from either the terms of their subcontract agreements or the Miller Act (40 U.S.C. 270a-d). Several of the witnesses the subcontractor community noted that while most standard form subcontract agreements specified a payment term that met the minimum standard specified, an individual subcontractor was frequently faced with the prospect of having to accept significantly less favorable terms during the course of negotiations with the prime contractor.

The Miller Act was enacted to provide ultimate payment protection to subcontractors and material suppliers on Federal construction projects by requiring the prime contractor to furnish the Government a payment bond. If the prime contractor fails to make payment to the subcontractor or material supplier, they may look to the surety company that issued the bond. The Miller Act was never intended to be the remedy for delays in payments during the course of contract performance. In practice, the subcontractor must voluntarily quit performance on the job to be able to exercise its Miller Act rights. Generally, a subcontractor or supplier will only file suit under the Miller Act, and seek to obtain payment from the surety company that issued the bond, if the prime contractor appears to be insolvent and in danger of default to the Government. It is not a viable remedy for the resolution disputes regarding delayed payments arising during contract performance. Section 7 seeks to fill this void.

Subsection (a) of the new Section 3905 added by Section 7 of S. 328 requires that the prime contractor include a payment clause in its contracts with its various subcontractors that meets two fundamental standards. Subsection (a)(1) specifies the "prevailing industry standard" as the payment term. The prevailing industry standard is currently deemed to be payment of a subcontractor by the prime contractor within seven days of receipt of payment from the Government. The prevailing industry standard is based upon a joint policy statement on prompt payment issued by the Associated General Contractors of America (AGC), the American Subcontractors Association (ASA), and the Associated Specialty Contractors (ASC).

The Committee expects that the payment term initially prescribed by the Federal Acquisition Regulation (FAR) for use in the construction subcontract payment clause would be the current standard of the AGC-ASA-ASC Joint Policy Statement on Prompt Payment.

Subsection (a)(2) of new section 3905, which is the principle enforcement mechanisim to ensure timely subcontractor payment, requires that the agreement between a prime contractor and a subcontractor must entitle the subcontractor to a late payment interest penalty at the same rate applicable between the prime contractor and the Government, if the prime contractor fails to make payment in accordance with its subcontract's payment clause.

The Subsection was drafted specifically to recognize and preserve the principle of privity of contract between a prime contractor and its subcontractors. The section merely seeks to accord the protections of the Prompt Payment Act to construction subcontractors within the "four corners" of their subcontract agreements. Other than the prescribed minimum standards outlined above, the parties to the subcontract are completely unfettered to negotiate the other terms of their payment clause. Subsection (a) will only insure that the prime contractor's subcontract agreements include a payment clause, specifying the responsibilities and rights of the parties to the subcontract agreement.

The Committee finds that a subcontract provision specifying the minimum standards for the subcontract's payment clause to be compatible with the broad array of contract clauses currently required by the FAR to be included in the subcontracts awarded by a prime contractor with a federal construction contract. Some 28 FAR clauses are required to be flowed-down from prime contractors to its subcontractors. Some of these clauses go to the very essence of the performance of the construction project. Others are important to the effective management of the contract, such as the provisions relating to value engineering or government access to subcontractor cost or other data. Finally, others relate to statutorily-mandated socio-economic programs, such as prevailing wage standards, affirmative action requirements, small business participation, safety, and environmental protection.

Subsection (b) of the proposed new section to the Prompt Payment Act, as codified, expressly recognizes the right of the parties to the subcontract agreement to negotiate provisions governing withholding and retainage. In so doing, it preserves to the prime contractor the continued use of the traditional contract administration tools of withholding and retainage, through which a prime contractor manages its subcontractors.

Pursuant to such subcontract provisions, the prime contractor may withhold all or part of the subcontractor's request for payment upon a finding of good cause. The subsection requires that the prime contractor make the determination to withhold, and specify the amount to be withheld, prior to making application to the Government for work performed by the subcontractor. The subcontractor's entitlement to timely payment, or interest penalties for late payment, only applies when no dispute exists as to performance. The subcontractor is not entitled to payment if his or her performance is not in conformity with the project schedule or the government's specifications. The prime contractor would continue to make such determinations. Further, the prime contractor may be entitled by its subcontract agreement to withhold a portion of payment for: (1) work that is in dispute; (2) third party claims, filed or reasonably expected to be filed; (3) alleged damages suffered by the prime contractor or another subcontractor; or (4) overdue subcontractor payments for labor, equipment, or materials.

This Section does not impair the ability of a prime contractor to obtain the payment and performance bond required by the Miller Act. According to an April 8, 1987, letter from Mr. John J. Curtin, Jr., president of the National Association of Surety Bond Producers, which was submitted to this Committee, ". . . none of the

members of our Executive Committee felt that it [Section 7 of S. 328] would inhibit the ability of General/Prime contractors to obtain bonds".

The section also in no way impairs the prime contractor's right to require its subcontractors to provide performance and payment bonds. The prime contractor remains responsible for the selection of "responsible subcontractors", i.e., those capable of performing. If the prime contractor feels that a particular subcontractor should be required to post performance and payment bonds, that requirement may be made a condition of their subcontract agreement. Likewise, the prime contractor should be free to use a subcontractor that has a solid performance record, but is only marginally bondable, due to other considerations.

Subsection (c) makes clear that any amount withheld or retained from a subcontractor by the prime contractor shall remain in the hands of the Government until such time as the prime contractor determines that the subcontractor is entitled to these funds. Thus, it is essential that a prime contractor identify subcontractor performance deficiencies and other claims in its application for payment, and any accompanying certificate, to the Government and not request payment for amounts in dispute with the subcontractor until such dispute is resolved. If the prime contractor discovers a defect in a subcontractors's work after the work has been certified by the prime contractor to the Government as complete but before the subcontractor is paid, the prime contractor is responsible for notifying the Government of the defect. Since the prime contractor has determined that the subcontractor has not earned the amount attributable to the defective work, these funds must be returned to the Government. If a prime contractor discovers a defect in a subcontractor's work after payment is made to the subcontractor for that portion of its work, but before final payment is made to the subcontractor, the prime contractor may reduce future payments to the subcontractor by a suitable amount as long as the prime contractor provides proper notice to the Government and does not request any funds from the Government which it does not intend to pay to the subcontractor.

Amounts which the prime contractor has not requested from the Government because they represent sums withheld from a subcontractor or cause or retained from a subcontractor for the protection of the prime contractor are not intended to be managed in any fashion different from any other Government funds obligated for the completion of the project but awaiting disbursement in accordance with the payment terms of the contract. The Committee does not intend, nor should the provision be construed to establish any form of "constructive trust" relationship with respect to these funds. The disbursement of these funds by the Government to the prime contractor, and their subsequent disbursement to the subcontractors is to be determined by the prime contractor in accordance with the terms of the subcontract agreements, meeting the minimum standards prescribed by this provision.

Subsection (c) of new section 3905, is designed to identify the point in time when a prime contractor may request payment in full from the agency. The provision mirrors the construction industry standard practice regarding limitation on a prime contractor's col-

lecting payments in full from the Government but making less than full and timely payment to their subcontractors.

Subsection (d) makes clear that the resolution of any performance dispute or other claim arising out of subcontractor performance remains subject to resolution between the parties to the subcontract, whether through negotiation, arbitration, or judicial action. In no circumstances should the Government's contracting personnel be called upon to resolve a performance dispute between a prime contractor and one of its subcontractors.

The minimum standards established by this provision are based on a "pay-when-paid" principle, as are the majority of subcontracts on private construction. The current practice when a subcontractor believes a prime contractor is unnecessarily delaying payment is for the subcontractor to contact the Government's contracting officer and to request appropriate payment information. This is also the most common practice in private construction. Such a provision allows the subcontractors to obtain sufficient information to pursue payments due them from the general contractor under the terms of their subcontract agreements.

Subsection (e) explicitly leaves unimpaired any contractural administrative or judicial remedies presently available to contractors or subcontractors for the resolution of payment disputes. For example, it does not establish payment by the Government as a condition precedent for a subcontractor to bring suit under the Miller Act.

Subsection (f) makes clear that the payment of any late payment interest penalties incurred by the contractor may not be passed along to the Government, nor may the subcontractor pursue such late payment interest penalties with the Government.

Similarly, this provision does not create an entitlement for subcontractor's to share in late payment interest penalties received by a prime contractor by the Government. It operates when the prime contractor fails to pay the subcontractor in accordance with their subcontract out of funds received from the Government.

Section 8. Limitations on Discount Payment

In an effort to get paid quickly, contractors often will offer the Government a price discount for early payment. For example, a contractor may offer a 2% discount from its contract price in exchange for being paid by the Government within 20 days instead of the 30 days specified in its contract. Representatives of the small business government contractors testified before the Committee that some agencies "take the discount after the prescribed period has expired. Not only is the vendor not getting paid on time; he or she is not getting complete payment." The GAO study estimated that during the four months of its investigation, about 146,000 discounts, for an approximate total of $2 million, were unfairly taken by the government after the discount period had expired. Section 8 is intended to prevent such abuses.

This section clarifies the period during which an agency may legitimately take advantage of a contractor's offer of a price discount for early payment. It makes clear that the discount period begins when a proper invoice is received by the first office designated in the contract to first receive the invoice. If the agency is to avail

itself of the discount offered, it must make payment before the expiration of the period specified in the contractor's "fast pay" offer. The burden of accomplishing acceptance and other administrative matters prior to making payment against the contractor's proper invoice falls on the agency seeking to accept the discount price.

Section 9. Reports

The Prompt Payment Act requires OMB to submit an annual report to Congress showing the number, amounts and frequency of interest penalty payments. GAO found that measurement of agency performance on the basis of these criteria has distorted the reports submitted to the Congress.

Section 9 amends the Prompt Payment Act to assure that OMB reports a more accurate and complete picture of agency compliance with the Act. Under this provision, data will be collected on the number and dollar value of invoices paid after the required payment date wihtout payment of any interest penalty. The provision also requires the reporting agency to identify the reason a later payment interest penalty was not incurred. Currently, agencies are only reporting late invoices upon which an interest penalty was paid.

The United States Postal Service (USPS) is specifically exempted from this reporting requirement to the Office of Management and Budget by Section 3(b) of the bill. As noted in the discussion of that provision, however, it is intended that the USPS collect data on its billpaying performance to permit senior management to monitor compliance and to permit Congressional oversight.

Section 10. Implementation Through the Federal Acquisition Regulation

Subsection (a) of this section requires that the Prompt Payment Act be implemented in the Federal Acquisition Regulation (FAR). No coverage is presently included, despite the fact that the FAR was issued subsequent to the enactment of the Prompt Payment Act.

Subsection (b) specifically identifies the provisions of the Act which require FAR implementation, principally through the issuance of appropriate solicitation provisions and contract clauses.

Paragraph (1) establishes parameters for the payment terms to be developed. The fundamental theme is to conform to prevailing market practice whenever possible. This is especially important when acquiring commercial items of supply or services (including construction) in which prevailing practices are defined principally by private commercial activity. When the Government enters an essentially commercial market, it should conform its payment terms to those of the market, unless compelling reasons dictate otherwise. For example, the Committee has been informed that a ten-day payment term prevails in the commercial marketplace for doing products (such as, milk, butter, cheese, ice cream, and yogurt) and edible fats and oils (and products made from them, such as marjorine, mayonnaise and salad dressing), yet some Federal agencies have been reluctant to recognize these payment terms. They demand a 30-day payment term. At the same time, some of these agencies seek "most favored customer" pricing, while requiring the

longer payment term. It is also intended that these regulations will afford the contracting officer the flexibility to specify a payment term for an individual contract or a class of contracts that will tap the market most effectively. It is favorably noted that the General Services Administration adopted this approach in Temporary Regulation 66 (Prompt Payment Procedures) to the former Federal Procurement Regulations (FPR) issued on October 5, 1982 to implement the Prompt Payment Act. Unfortunately, these regulations were not incorporated into the FAR, which superceded the FPR when the FAR became effective on April 1, 1984.

Paragraph (2) provides guidance concerning the regulations addressing periodic payments in response to periodic invoices for supplies furnished or service performed during the terms of a contract. In implementing the provision, the Commitee does intend to slow the prompt payment of certain progress payments due under various cost-reimbursement type contracts, especially for major systems contracts awarded by the Department of Defense or the civilian agencies.

Paragraph (3) calls for regulations implementing the bill's amendment regarding periods for acceptance. The purposes of these amendments have been described previously in Section 3 (Definitions and Application) of this section-by-section analysis.

Paragraph (4) requires implementation of the Act's provisions relating to the Government's taking "early payment" discounts.

Paragraph (5) requires implementation of increased late payment interest penalties when the conditions of section 4(c)(2) of the bill are met.

Subsection (c) specifies a time certain for issuance of proposed regulations and requires their publication for public comment.

V. Section-by-Section Analysis

Section 1. Short Title

This section establishes the bill's citation as the "Prompt Payment Act Amendments of 1987."

Section 2. Congressional Findings

This section enunciates a series of congressional findings based upon the four fiscal years of experience with Federal agency billpaying practices since the Prompt Payment Act became effective on October 1, 1982. The first congressional finding is that the Prompt Payment Act has generally improved the billpaying practices of the Federal agencies. This improvement in timely bill paying has resulted in fairer treatment of the thousands of contractors, the majority of whom are small businesses furnishing supplies, services, or construction to the Federal Government. The succeeding paragraphs of this section summarize the specific problems that have been identified. Remedies to these implementation problems are set forth in the subsequent sections of the bill.

The section also specifically recognizes that the delegates to the 1986 White House Conference on Small Business adopted a recommendation calling on the Congress and the President to strengthen the Prompt Payment Act of 1982 and ensure that it is vigorously enforced.

Section 3. Definitions and Application

Subsection (a) of this section amends the Prompt Payment Act by requiring a clearer definition of the starting point for the time period during which an agency is required to effect payment. The length of time for payment is prescribed by either the contract's specific payment provision or in accordance with the Act's standards, in the absence of such a specific contractual payment term. Under the Prompt Payment Act, the starting point for the "payment clock" is the receipt of a proper invoice by the designated payment office or the date the supplies, services or construction are formally accepted by the Federal agency, whichever is later. Acceptance in Government contract practice is distinct from simple delivery of supplies or the completion of the performance of a service. Given that the time of acceptance is solely in the hands of the Federal agency, the agencies are also in control of the starting point of the "payment clock."

Section 3(a) of the bill amends the acceptance provision of the Act by specifying that acceptance, exclusively for the purpose of determining the timeliness of payment, is deemed to have been accomplished 5 days after delivery (or final performance of a service, including construction), unless the contract solicitation specifies a longer period for acceptance. This amendment preserves the Government's right to assure itself adequate time to accomplish acceptance, but also assures that it will inform the contractor of acceptance periods exceeding 5 days when the contractor is seeking to compete for the contract rather than when he or she is seeking to get paid for work completed.

The amendment does not compel the Government to pay for supplies or services (including construction) that it has not had the opportunity to inspect and actually accept. Rather, it merely lifts the financial burden of unexpected Government delay from the contractor by requiring the payment of interest. Payment of the contract price, and any accrued interest penalties, will only be payable after actual acceptance (if a proper invoice has been received).

This section also amends 31 U.S.C. 3901(a)(4)(A) to make explicit that the "payment clock" is triggered when a proper invoice is actually received by the place or person designated by the agency to first receive the invoice. This provision was modified during Committee consideration to broaden the reach of the provision to encompass agent's designated by an agency, both Governmental and non-Governmental. This provision requires an agency to measure the timeliness of a payment or a designated agent from the time it first receives a proper invoice, if this event triggers the start of the "payment clock".

Subsection (b) of this Section amends the Prompt Payment Act to explicitly cover the United States Postal Service (USPS). The amendment reserves to the Postmaster General the authority to implement the Act through the USPS's own procurement regulations. The Subsection also exempts the USPS from reporting its compliance with the Act to the Office of Management and Budget, in recognition of its independent status.

Section 4. Interest Penalties: Reductions in Grace Period; Increased Penalties

Subsection (a) of this Section would gradually eliminate the Prompt Payment Act's current 15-day "grace period", during which an agency may pay a bill late without incurring any interest penalty. The 15-day "grace period" is initially reduced to seven days. All grace periods are eliminated on October 1, 1989.

Subsection (b) of this Section amends the Act to make explicit that interest penalties for late payment are to be paid automatically for amounts of $1.00 or more. Further, it makes an agency liable for twice the interest penalty otherwise due to a contractor, if strict conditions are met. First, the contractor must be entitled to a late payment penalty. Second, the agency must have actually made a payment to the contractor which did not include any late payment interest penalty. Third, the agency would have ten days from the date of its payment to the contractor to catch any inadvertant failure to pay the late payment interest penalty and to make such payment. Agency corrective action during the ten day period would eliminate the contractor's entitlement to the double interest penalty. And, finally, the contractor must make a written demand for the late payment interest penalty within forty days of the date of payment, thus limiting the Government's potential exposure. The provision entitles the contractor to twice the late payment interest penalty; it does not effect the payment due for contract performance.

During Committee consideration, a new provision was added to this Section. It makes explicit that the Act's protections are not abrogated in the event that an agency is unable to make timely payments due to a temporary unavailability of funds. When funds become available, the contractor is entitled to whatever later payment interest penalty due in addition to the payment due for contract performance.

Section 5. Interest Penalties on Progress Payments and Retained Amounts Under Construction Contracts

This section makes explicit the intent of the Prompt Payment Act that progress payments under construction contracts are subject to the Act's protections. It recognizes seven days as the prevailing industry standard in the private sector for payment of the prime contractor by the owner, i.e., the Government. It reserves to the Government the right to specify a longer period in the contract solicitation, however, upon demonstrating that such longer period is the prevailing practice for the type of construction being procured.

The section also extends the Act's protection to amounts "retained" from progress payments paid to the contractor by the agency during the term of a construction contract. The agency shall be liable for a late payment interest penalty if it fails to make timely release of retained amounts in accordance with the terms of the contract or within 30 days of acceptance, whichever is the shorter period.

Section 6. Periodic Payments Under Supply and Service Contracts

This section clarifies 31 U.S.C. 3903(4) with respect to the Act's application to various periodic payments authorized under some supply and many service contracts. Under this provision, a vendor who had furnished items of supply or a service, accepted by the agency, would be entitled to a late payment interest penalty, if the agency failed to pay in accordance with the payment terms of the contract or within 30 days in the absence of a contractual payment term.

Section 7. Payment Clause for Subcontractors Under Construction Contracts

This provision adds a new section to the Prompt Payment Act which extends the Act's protections to subcontractors under federal construction contracts. It does so by specifying the minimum standards for the payment clause that a federal construction contractor must include in its contracts with its subcontractors.

Subsection (a) of the proposed new section to the Act requires that the prime contractor include a payment clause in its contracts with its various subcontractors. The "prevailing industry standard" is specified as the payment term. The prevailing industry standard is currently deemed to be payment of a subcontractor by the prime contractor within seven days of receipt of payment from the Government by the prime contractor. The prevailing industry standard is based upon a joint policy statement on prompt payment issued by the Associated General Contractors of America (AGC), the American Subcontractors Association (ASA), and the Associated Specialty Contractors (ASC).

Subsection (a)(1) provides that a prime contractor pay its subcontractors promptly, in accordance with the prevailing industry standard, from amounts paid to the prime contractor by the Government, a so-called "pay when paid" relationship. The subcontractor is only entitled to payment for work staisfactorily performed. As with the Prompt Payment Act's application between a prime contractor and the Government, a subcontractor's entitlement to timely payment, or interest penalties for late payments, only applies when no dispute exists as to performance. The prime contractor determines the acceptability of its subcontractors' performance, and hence their entitlement of payment.

Subsection (a)(2) entitles a subcontractor to a late payment interest penalty, if the prime contractor fails to pay the subcontractor in accordance with the payment clause required to be included in the subcontract agreement between them. The interest rate specified is the same rate that is applied to late payments by the Government to the prime contractor. It should be noted, however, that the provision does not create an entitlement for subcontractor to share in any late payment interest penalties receive by a prime contractor due to late payment by the Government. It operates when the prime contractor fails to pay the subcontractor in accordance with their subcontract agreement from funds actually received by the prime contractor from the Government.

Subsection (b) of the proposed new section to the Prompt Payment Act, as codified, expressly recognizes the right of the parties

to a subcontract agreement to negotiate provisions governing withholding and retainage. Pursuant to such subcontract provisions, a prime contractor may withhold all or a part of the subcontractor's request for payment upon making a finding of good cause. The subsection requires that the prime contractor make the finding as to good cause and the determination to withhold, specifying the amount to be withheld, prior to making application to the Government for payment for work performed by the subcontractor.

Similarly, under subsection (b)(2), the subcontract agreement may provide for the retaining by the prime contractor of a specified percentage of any progress payment otherwise due to the subcontractor for work satisfactorily performed. The provision recognizes that the subcontract agreement may provide for such retainage exclusively for the protection of the prime contractor, without any finding as to casuse as is presently required for retainage from the prime contractor by the Government. The provision goes on to specify that at such time as any retained amounts are released to the prime contractor by the Government, the terms of the subcontract agreement must obligate the prime contractor to disburse the retained amount to the subcontractor within seven days of receipt of these funds from the Government.

Subsection (c) provides that no amounts withheld or retained from a subcontractor by the prime contractor may be released by the Government until such time as the prime contractor has made a determination that the subcontractor is entitled to the payment of any amounts requested for the subcontractor. To underscore the reliance which the Government places on the prime contractor in determining a subcontractor's entitlement to any amounts requested, the provision requires a certification. This subsection reinforces the intent of the section that the prime contractor maintains firm control over payments to its various subcontractors. It gives strong recognition to the proposition that the Government looks to the prime contractor to be responsible for the management of the subcontractors performing work on the federal project. The provision underscores the intent of the section to maintain the privity of contract between the Government and the prime contractor and the prime contractor and its various subcontractors.

Subsection (d) explicitly removes the Government from the resolution of any disputes between the prime contractor and a subcontractor relating to the subcontractor's entitlement to a payment or the amount of such payment. Similarly, disputes pertaining to a subcontractor's entitlement to a late payment interest penalty, or the amount of such penalty, is not a dispute to which the Government is a party. It is the unequivocal intent of the subsection that any dispute pertaining to the adequacy of a subcontractor's performance or its entitlement to any payments under the terms of the subcontract agreement are to remain subject to exclusive resolution between the parties to the subcontract through negotiation, arbitration (if provided by the subcontract agreement), or recourse to presently available judicial remedies. The section creates no new responsibility in the Government's contracting officer to participate in the resolution of payment or performance disputes between a prime contractor and its subcontractors.

Subsection (e) makes clear that the section is not intended to limit or impair any contractual, administrative, or judicial remedies otherwise available to a subcontractor or a contractor in the event of a dispute involving the timeliness, amount, or entitlement of a payment to a subcontractor by the prime contractor. For example, it does not establish payment by the Government as a condition precedent for a subcontractor to bring suit under the Miller Act (40 U.S.C. 270 a-d).

Subsection (f) makes clear that the payment of any late payment interest penalties incurred by the contractor may not be passed along to the Government, nor may the subcontractor pursue such late payment interest penalties with the Government.

Section 8. Limitations on Discount Payment

This section clarifies the period during which an agency may legitimately take advantage of a contractor's offer of a price discount for early payment. It makes clear that the discount period begins when a proper invoice is received by the first office designated in the contract to first receive the invoice. If the agency is to avail itself of the discount offered, it must make payment before the expiration of the period specified in the contractor's "fast pay" offer. The burden of accomplishing acceptance and other administrative matters prior to making payment against the contractor's proper invoice falls on the agency seeking to accept the discount price.

Section 9. Reports

This section amends the Prompt Payment Act's reporting requirements to assure that data will be collected on the number and dollar value of invoices paid after the required payment date without payment of any interest penalty. The provision also requires the reporting agency to identify the reason a late payment interest penalty was not incurred. Currently, agencies are only reporting late invoices upon which an interest penalty was paid. GAO found that measurement of agency performance on the basis of this criteria had distorted the reports submitted to the Congress. This amendment will assure that OMB reports a more accurate and complete picture of agency compliance with the Act. The United States Postal Service (USPS) is specifically exempted from this reporting requirement to the Office of Management and Budget by Section 3(b) of the bill. It is intended, however, that the USPS collect data on its billpaying performance to permit senior management to monitor compliance and to permit Congressional oversight.

Section 10. Implementation Through the Federal Acquisition Regulation

Subsection (a) of this section requires that the Prompt Payment Act be implemented in the Federal Acquisition Regulation (FAR). Presently, no coverage is included.

Subsection (b) specifically identifies the provisions of the Act which require FAR implementation, principally through the issuance of appropriate solicitation provisions and contract clauses.

Paragraph (1) establishes parameters for the payment terms to be developed. The fundamental theme is to conform to prevailing market practice whenever possible. This is especially important

when acquiring commercial items of supply or services (including construction) in which prevailing practices are defined principally by private commercial activity. It is also intended that these regulations will afford the contracting officer the flexibility to specify a payment term for an individual contract or a class of contracts that will most effectively tap the market.

Paragraph (2) provides guidance concerning the regulations addressing periodic payments for supplies furnished or service performed during the term of a contract.

Paragraph (3) requires regulations implementing the amendment specifying the duration of acceptance periods for the purpose of determining timely payment to a contractor by the Government.

Paragraph (4) requires implementation of the Act's provisions relating to the Government's taking "early payment" discounts.

Paragraph (5) requires implementation of increased late payment interest penalties when the conditions of Section 4(c)(2) of the bill are met.

Subsection (c) specifies a time certain for issuance of proposed regulations and requires their publication for public comment.

Section 11. Effective Dates

This section establishes the effective dates for the bill's various provisions. Subsection (a) provides the agencies with an implementation period of at least 90 days for most of the bill's provisions. The provision includes the phrase "contracts awarded, contracts renewed, or contract options exercised" to make explicit the Act's coverage of long-term contracts. Under interpretation of certain agencies, all contracts awarded prior to October 1, 1982 were exempt from the Act's protection, although the option years for some of these contracts ran into the 1990's. This amendment seeks to make explicit the coverage of payments due under such long-term contracts. Subsection (b) establishes the effective date for the Prompt Payment Act's explicit application to the United States Postal Service. Subsection (c) requires OMB to change the agency reporting requirements under the Act beginning with FY 88.

VI. Matters Required to be Discussed Under Senate Rules

A. COMMITTEE CONSIDERATION OF S. 328

The Committee met on May 19, 1987 to consider S. 328. Senator Sasser offered an amendment in the nature of a substitute for the bill.

Senator Levin offered an amendment in the second degree to strike Section 7 of the Act and add to the bill a provision entitled, "GAO Study of Payments to Subcontractors Under Construction Contracts". After discussion by Members of the Committee, Senator Levin modified his amendment to delay the effective date of Section 7 for one year from date of enactment and require the GAO study during the period. This amendment was discussed by the Committee. The roll-call vote on the amendment, as modified, was as follows:

For	*Against*
Carl Levin (D-MI)	Sam Nunn (D-GA) [1]
David Pryor (D-AR)	Jim Sasser (D-TN)
Jeff Bingaman (D-NM)	George J. Mitchell (D-ME) [1]
	William V. Roth, Jr. (R-DE)
	Ted Stevens (R-AL) [1]
	William S. Cohen (R-ME) [1]
	John Heinz (R-PA) [1]
	Paul Trible (R-VA) [1]
	John Glenn (DpOH)

[1]By proxy.

The Committee then considered the amendment in the nature of a substitute offered by Senator Sasser. Upon a motion by the Chairman, it was adopted unanimously on a voice vote.

A quorum being present, the Committee had already ordered S. 328 reported, as amended by the Committee.

B. COST OF THE LEGISLATION

The Prompt Payment Act of 1982 does not authorize any additional appropriations to pay for late payment interest penalties incurred by the agencies due to untimely payments of their contractors. This provision of the Act, presently codified at 31 U.S.C. section 3902(d), specifically requires the payment of all late payment interest penalties from funds made available to carry out the program which incurred the late payment interest penalty. S. 328 does not modify this provision.

In compliance with Rule XXVI of the Standing Rules of the Senate, the Committee requested the Congressional Budget Office to estimate the cost of the legislation. Their response is as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 19, 1987.

Hon. JOHN GLENN,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 328, the Prompt Payment Act Amendments of 1987, as ordered reported by the Senate Committee on Governmental Affairs, May 19, 1987.

The bill would make several changes in current law designed to improve federal agencies' performance in paying bills on time. Under the Prompt Payment Act of 1982, an agency is supposed to pay an interest penalty to a contractor if it pays its bill late. A recent General Accounting Office (GAO) report (GAO/AFMD-86-69, August 1986), however, states that, in a sample survey, agencies did not pay 87 percent of interest penalties owed for late payment of bills. S. 328 would reinforce current law by requiring agencies to pay interest penalties without regard to whether the contractor has requested payment of the penalty. In addition, the bill would double the interest penalty owed under certain conditions and would phase out the grace period agencies currently have to pay bills on time. The bill would also expand agencies' reporting re-

quirements to include extensive information about all late payments rather than just the amount of interest paid on late payments as required under current law.

Agencies are already required by law to do much of what the bill would mandate. Thus, the incremental effect of this legislation is difficult to determine, because there is no clear basis to asses its effects on agency implementation and on the Office of Management and Budget's administrative efforts to increase compliance. GAO believes that management techniques, such as prompt payment efforts, that are supported by legislation have the greatest likelihood of full agency implementation. Therefore, S. 328 will probably enhance the Administration's efforts to ensure prompt payment, and result in fewer bills being paid late and more interest penalties being paid on bills that are still paid late.

There is no basis, however, for estimating the bill's precise budgetary impact, but we can approximate the maximum cost to the government, assuming that the bill is very effective in accomplishing its aims. If, for example, the bill has the effect of ensuring that all interest penalties not currently being paid would, in fact, be paid, we estimate that the federal government sould spend an additional $10 million to $15 million on interest penalties in 1988, increasing to about $40 million to $50 million in 1991, as the grace period is phased out. In the short-term, such costs would come from program funds that would otherwise be available for other purposes. Over a longer period, appropriation levels might be affected (through the Prompt Payment Act does not allow appropriations specifically for the purpose of paying interest penalties). If, on the other hand, all payments would be made on time as a result of the bill, the budget impact would be reflected in higher interest on the public debt, in amounts similar to the interest penalties discussed above.

Enactment of this bill would not affect the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely

JAMES BLUM
(For Edward M. Gramlich, Acting Director).

C. EVALUATION OF REGULATORY AND PAPERWORK IMPACT

Pursuant to the requirements of paragraph 11(b) of Rule XXXVI of the Standing Rules of the Senate, the Committee has considered the regulatory and paperwork impact of S. 328. It has also considered the bill's impact on the privacy of individuals or firms doing business with the Federal Government.

Section 10 (Implementation Through the Federal Acquisition Regulation) of S. 328 requires the promulgation of new regulations implementing the provisions of the Prompt Payment Act, as amended by the bill, in the Government-wide Federal Acquisition Regulation (FAR). Presently, the FAR does not contain provisions implementing the Act. The reports issued by the GAO in both 1978 and 1986 noted that the lack of specific contractual payment terms was a fundamental cause of many of the late payment problems

being confronted by Government contractors. Further, in the Committee's analysis, the regulatory implementation required by the bill will not create any additional burdens on the vast majority of Government contractors. The FAR coverage mandated by the bill will assure that the contract solicitation provisions, and the resulting contract clauses, clearly specify when the contractor is entitled to be paid.

During the debate on Section 7 (Payment Clause for Subcontracts Under Construction Contracts), it has been claimed that this provision will piace substantial new regulatory and paperwork burdens on federal construction contractors. In the Committee's analysis, the regulatory implementation of Section 7 will result in very minimal new burdens on federal construction contractors.

The centerpiece of Section 7 is the requirement that the subcontract agreement between a federal construction contractor and its various subcontractors contain a payment provision meeting the minimal standards specified. Given that a payment term is an essential element of any complete contractual agreement, most construction subcontract agreements already contain such a provision. As has been discussed previously in this report, the subcontractor payment provisions all too frequently found in actual subcontract agreements do not, however, either comport with the "prevailing industry standard" as to the timing of payments, nor entitle the subcontractor to late payments interest penalties under the same conditions, and at the rate, specified by the Prompt Payment Act for late payments by the Government to the prime contractor. Thus, while Section 7 will result in changes to subcontract payment clauses to meet the minimum standards enunciated, no additional regulatory or paperwork burden flows from the requirement.

Section 7 does not directly add any additional paperwork burden on the general contractor relating the processing of requisitions for progress payments, as has been suggested. Under current FAR provisions, the contracting officer has the right to require the general contractor to furnish documentation to substantiate the amount of its progress payment request. Under the terms of most standard subcontract agreements, including those of the Associated General Contractors of America and the American Institute of Architects, the subcontractor is required to submit substantiation for its progress payment request to the general contractor. Under those same standard form agreements, the general contractor has the right to inspect the underlying subcontractor performance and to approve the amount of the request, before including each subcontractors' request within its overall progress payment request to the Government. Thus, the general contractor is already well positioned to make the certification required by 31 U.S.C. 3905(c), as amended, without additional paperwork burden. Further, it should be noted that some Federal agencies already require the prime contractor to make certifications concerning its progress payment requests.

In the Committee's opinion, none of the other provisions of Section 7 place any additional regulatory or paperwork burden on prime contractor under federal construction projects. This position is advanced since the other provisions of the Section are intended to insulate the Government from becoming involved in perform-

ance and payment disputes between the prime contractor and its various subcontractors, and to prevent the prime contractor from passing to the Government the costs it has incurred through the payment of late payment interest penalties to its subcontractors.

In the Committee's analysis, the bill does not adversely impact on the privacy of individuals or firms doing business with the Government. No provision of the bill requires the submission of information that could be deemed even "business confidential".

D. Changes in Existing Law

In compliance with rule XXVI(12) of the Standing Rules of the Senate, changes in existing law made by the statutory provisions of the bill are as follows (existing law proposed to be omitted is enclosed in brackets, new material is printed in italic, and existing law in which no change is proposed is shown in roman):

Prompt Payment Act of 1982

[As Codified at Chapter 39 of Title 31, United States Code]

* * * * * * *

CHAPTER 39—PROMPT PAYMENT

Sec.
3901. Definitions and application.
3902. Interest penalties.
3903. Regulations.
3904. Limitations on discount payments.
3905. Reports.
3906. Relationship to other laws.

§ 3901. Definitions and application

(a) In this chapter—

(1) "agency" has the same meaning given that term in section 551(1) of title 5 and includes an entity being operated, and the head of the agency identifies the entity as begin operated, only as an instrumentality of the agency to carry out a program of the agency.

(2) "business concern" means—

(A) a person carrying on a trade or business; and

(B) a nonprofit entity operating as a contractor.

(3) "proper invoice" is an invoice containing or accompanied by substantiating documentation the Director of the Office of Management and Budget may require by regulation and the head of the appropriate agency may require by regulation or contract.

[(4) The head of an agency is deemed to receive an invoice on the later of the dates that—

[(A) the designated payment office or finance center of the agency actually receives a proper invoice; or

[(B) the head of the agency accepts the applicable property or service.]

(4) the head of the agency is deemed to receive an invoice on the later of—

(A) the date on which the place of person designated by the agency to first receive such invoice actually receives a proper invoice; or

(B) on the fifth day after the date on which in accordance with the terms and conditions of the contract, the property is actually delivered or final performance of the services is actually completed, as the case may be, unless—

(i) the agency has actually accepted such property or services before such fifth day; or

(ii) the contract specifies a longer period for agency acceptance of the property or services.

(5) a payment is deemed to be made on the date a check for the payment is dated.

(6) a contract to rent property is deemed to be a contract to acquire the property.

(b) This chapter applies to the Tennessee Valley Authority. However, regulations prescribed under this chapter do not apply to the Authority, and the Authority alone is responsible for carrying out this chapter as it applies to contracts of the Authority.

(c) This chapter, except section 3906 of this title, applies to the United States Postal Service. However, the Postmaster General shall be responsible for issuing the implementing procurement regulations, solicitation provisions, and contract clauses for the United States Postal Service.

§ 3902. Interest penalties

(a) Under regulations prescribed under section 3903 of this title, the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due. The interest shall be computed at the rate the Secretary of the Treasury establishes for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611). The Secretary shall publish each rate in the Federal Register.

(b) Except as provided in section 3906 of this title, the interest penalty shall be paid for the period beginning on the day after the required payment date and ending on the date on which payment is made. However, a penalty may not be paid if payment for the item is made—

(1) when the item is a meat or meat food product described in section 3903(2)(A) of this title, before the 4th day after the required payment date;

(2) when the item is an agricultural commodity described in section 3903(2)(B) of this title, before the 6th day after the required payment date; or

(3) when the item is not an item referred to in clauses (1) and (2) of this subsection, before the [16th] *8th* day after the required payment date.

(c)(1) Any amount of an interest penalty of $1.00 or more which is owed a business concern under this section shall be paid without regard to whether the business concern has requested payment of such penalty.

(2) If a business concern—

(A) is owed an interest penalty by an agency;

(B) is not paid the interest penalty in a payment made to the business concern by the agency on or after the date on which the interest penalty becomes due;

(C) is not paid the interest penalty by the agency within 10 days after the date on which such payment is made; and

(D) makes a written demand, not later than 40 days after the date on which such payment is made, that the agency pay such a penalty,

such business concern shall be entitle to receive an interest penalty equal to twice the amount of the interest payment that would otherwise be due.

(d) The unavailability of funds to make a timely payment due for property or services does not relieve the head of an agency from the obligation to pay interest penalties under this section.

[c**]** *(e)* An amount of an interest penalty unpaid after any 30-day period shall be added to the principal amount of the debt, and a penalty accures thereafter on the added amount.

[d**]** *(f)* This section does not authorize the appropriation of additional amounts to pay an interest penalty. The head of an agency shall pay a penalty under this section out of amounts made available to carry out the program for which the penalty is incurred.

[e**]** *(g)* A recipient of a grant from the head of an agency may provide in a contract for the acquisition of property or service from a business concern that, consistent with the usual business practices of the recipient and applicable State and local law, the recipient will pay an interest penalty on amounts overdue under the contract under conditions agreed to by the recipient and the concern. The recipient may not pay the penalty from amounts received from an agency. Amounts expended for the penalty may not be counted toward a matching requirement applicable to the grant. An obligation to pay the penalty is not an obligation of the United States Government.

§ 3903. Regulations

The Director of the Office of Management and Budget shall prescribe regulations to carry out section 3902 of this title. The regulations shall—

(1) provide that the required payment date is—

(A) the date payment is due under the contract for the item of property or service provided; or

(B) 30 days after a proper invoice for the amount due is received if a specific payment date is not established by contract;

(2) for the acquisition of meat or a meat food product (as defined in section 2(a)(3) of the Packers and Stockyards Act, 1921 (7 U.S.C. 182(3)), provide a required payment date of not later than 7 days after the meat or meat food product is delivered; and

(3) for the acquisition of a perishable agricultural commodity (as defined in section 1(4) of the Perishable Agricultural Commodities Act 1930 (7 U.S.C. 499a(4))), provide a required payment date consistent with that Act;

[(4) provide separate required payment dates for a contract under which property or service is provided in a series of partial executions or deliveries to the extent the contract provides for separate payments for partial execution or delivery; and]

(4) in the case of a construction contract, provide for the payment of interest on—

(A) any progress payment due under the contract for—

(i) a period of more than 7 days; or

(ii) a longer period if the contracting officer determines that the prevailing practice in private construction contracts is to provide such longer payment period; and

(B) any amount which has been retained during the performance of the contract and are due to be released to the contractor after final acceptance of the construction, if such retained amount is not paid to the contractor by the required payment date;

(5) provide for periodic payments, in the case of a supply or service contract which authorizes periodic payments during the contract period, upon—

(A) submission of an invoice for supplies delivered or services performed during the contract period, if an invoice is required by the contract; and

(B) either—

(i) acceptance of the supplies or services by an employee of an agency authorized to accept the supplies or services; or

(ii) certification, by such an employee, thta the performance covered by the payment conforms to the terms and conditions of the contract.

[5] *(6)* require that, within 15 days after an invoice is received, the head of an agency notify the business concern of defect or impropriety in the invoice that would prevent the running of the time period specified in clause (1)(B) of this section.

§ 3904. Limitations on discount payments

The head of an agency offered a discount by a business concern from an amount due under a contract for property or service in exchange for payment within a specified time may pay the discounted amount only if payment is made within the specified time. *For the purpose of the preceding sentence, the specified time shall be calculated from the date the invoice under the contract is received by the office or employee of the agency designated by the agency to first receive such invoice until the date of payment.* The head of the agency shall pay an interest penalty on an amount remaining unpaid in violation of this section. The penalty accrues as provided under sections 3902 and 3903 of this title, except that the required payment date for the unpaid amount is the last day specified in the contract that the discounted amount may be paid.

§ 3905. Payment clause for subcontracts under construction contracts

(a) Each construction contract awarded by an agency shall include a clause that requires the prime contractor to include, in each subcontract for property or services entered into by the prime contractor and a subcontractor (including a material supplier) for the purpose of performing such construction contract, a payment clause which obligates the prime contractor—

(1) to pay the subcontractor promptly (as determined in accordance with the prevailing industry standard) out of such amounts as are paid to the prime contractor by the agency for work satisfactorily performed by the subcontractor under that contract; and

(2) to pay to the subcontractor an interest penalty on amounts due in the case of each payment not made in accordance with such payment clause—

(A) for the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(B) computed at the most current rate of interest that has been determined by the Secretary of the Treasury for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) and published by the Secretary in the Federal Register.

(b) In addition to the payment clause required by subsection (a), a prime contractor may negotiate and include in the subcontract a provision which permits the prime contractor to make a determination, before making application to the agency for a payment for work performed by a subcontractor, that—

(1) all or part of the subcontractor's request for payment may be withheld for good cause; and

(2) a specified percentage of any progress payment otherwise due to the subcontractor may be retained for the protection of the prime contractor and be paid to the subcontractor within seven days after such amount is released to the prime contractor by the Government.

(c) A prime contractor may not request payment from the agency of any amount withheld or retained in accordance with subsection (b) until such time as the prime contractor has determined and certified to the agency that the subcontractor is entitled to the payment of such amount.

(d) A dispute between a prime contractor and a subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under a subcontract clause conforming to the standards of subsection (a) does not constitute a dispute to which the United States is a party. The United States may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

(e) Except as provided in subsection (d), this section shall not limit or impair any contractual, administrative, or judicial remedies otherwise available to a subcontractor or a contractor in the event of a dispute involving late payment or nonpayment by a prime contractor.

(f) A prime contractor's obligation to pay an interest penalty to a subcontractor pursuant to the payment clause included in a subcontract under subsection (a) may not be construed to be an obligation of the United States. A contractor may not obtain reimbursement from the United States for such interest penalty. A contract modification may not be made for the purpose of providing reimbursement of such interest penalty. A cost reimbursement claim may not include any amount for reimbursement of such interest penalty.

[§ 3905] *§ 3906.* Reports

[(a) By the 60th day after the end of each fiscal year, the head of each agency shall submit to the Director of the Office of management and Budget a report on interest penalty payments made under this chapter during that fiscal year. The report shall include the number, amounts, and frequency of the payments and the reasons the payments were not avoided by prompt payment.]

(a)(1) By the 60th day after the end of the fiscal year, the head of each agency shall submit to the Director of the Office of Management and Budget a report on the agency's payment practices during the fiscal year, including a description of the extent to which those practices satisfy the requirements of this chapter.

(2) In addition to such other information as may be required by the Director, the report required by paragraph (1) shall include—

(A) the number, dollar value, and percentage of invoices for which interest or other late payment penalties were paid, the amount of such late payment interest and other penalties, and the reasons the interest penalties were not avoided by prompt payment; and

(B) the number, dollar value, and percentage of invoices paid after the required payment date without payment of an interest penalty or other late payment penalty, and the reasons no obligations to pay such penalties was incurred with respect to such invoices or no amount for such penalties were included in the payments of such invoices.

(b) By the 120th day after the end of each fiscal year, the Director shall submit to the Committees on Governmental Affairs, Appropriations, and Small Business of the Senate and the Committees on Government Operations, Appropriations, and Small Business of the House of Representatives a report on agency compliance with this chapter. The report shall include a summary of the report of each agency submitted under subsection (a) of this section and an analysis of progress made in reducing interest penalty payments by that agency from prior years.

[§ 3906.] *§ 3907.* Relationship to other laws

(a) A claim for an interest penalty not paid under this chapter may be filed under section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605).

(b)(1) An interest penalty under this chapter does not continue to accrue—

(A) after a claim for a penalty is filed under the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.); or

(B) for more than one year.

(2) Paragraph (1) of this subsection does not prevent an interest penalty from accruing under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) after a penalty stops accruing under this chapter. A penalty accruing under section 12 may accrue on an unpaid contract payment and on the unpaid penalty under this chapter.

(c) Except as provided in section 3904 of this title, this chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract. A claim related to the dispute, and interest payable for the period during which the dispute is being resolved, is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

POSTAL SERVICE

Chapter 4 of Title 39, United States Code

§ 410. Application of other laws

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

(b) The following provisions shall apply to the Postal Service:

(1) * * *

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(9) Chapter 39 of title 31.

ADDITIONAL VIEWS OF MR. LEVIN

S. 328 is a much needed measure to ensure that our federal government lives up to its obligation to pay its bills on time. Many businesses, especially small businesses, simply cannot afford the financial difficulties caused by the government's failure to pay the money to which they are entitled.

The bill-paying practices of the federal government have improved over the five years since the Prompt Payment Act was enacted in 1982. However, some government agencies continue to exploit loopholes in the law. These proposed amendments are designed to prevent such practices by clarifying the date on which payments become due, making the payment of interest automatic, and phasing out a 15-day grace period that has been abused by some government agencies.

These are all worthwhile measures that enhance the purposes of the original Prompt Pay Act—to ensure that the federal government will accord the same treatment to private businesses that they expect and deserve from each other. It is on the strength of these important provisions that I voted for S. 328 in Committee and will continue to support the bill on the floor.

In addition, I recognize the concern of many small businesses that do not work directly with the federal government that they be given a fair shake as well. Subcontractors on federal construction projects, contractors on construction projects financed with federal backing, and others all feel that they deserve the same prompt payment rights accorded to those who contract directly with the government.

If these businesses are not paid promptly by the private parties with whom they contract, there may indeed be a problem. However, it is not the problem addressed by the original Prompt Pay Act, which was designed to regulate the conduct of the federal government—not that of private parties—and to ensure that the government lives up to the same industry standards that we understood already to be applicable to private companies.

Section 7 of S. 328, which would extend government-mandated prompt pay obligations to prime contractors on federal construction contracts may be good law. It may be that subcontractors on these contracts have at times been mistreated and that this additional protection is needed. At the same time, however, I have serious concerns about the unnecessary interference of government regulation in relationships between private parties. Such interference should be avoided except in those rare instances where a clear need can be shown.

While we have a large volume of anecdotal evidence, there is no study to which we can point that justifies the step taken by Section 7. We have no cumulative data on how many payments by prime contractors are unfairly delayed (and I emphasize unfairly because

there may be a host of legitimate reasons for delayed payments). We do not know how long such delays last or what the consequences are for the subcontractors.

Moreover, there are just too many unanswered questions about the practical consequences of imposing this new requirement on prime contractors to go ahead with the intervention at this time. For example:

1. How will a subcontractor know when the prime contractor is paid? Will the provision be enforceable if the subcontractor does not know?

2. Are prime contract payment requests directly traceable to subcontract payment requests? Will prime contractors and/or the government be able to determine to whom a given payment is due?

3. Will prime contractors try to avoid Section 7 by holding back payment request to the government? Will this slow down the payment process rather than speeding it up?

4. Will additional federal regulation of subcontracts be necessary to address prime contractor evasion of Section 7?

5. Will prime contractors be required to certify that payments have been made or will be made by subcontractors? Will this, in effect, make it a crime to violate Section 7?

6. Can subcontractors negotiate protection for themselves? If prime contractors have a dominant bargaining position, will they retaliate against subcontractors in other areas? Will the government have to step in to regulate these other areas as well.

7. Is the problem limited to federal construction contracts, or does it extend to federally-assisted projects and, indeed, to wholly private projects? Will the government have to step in and regulate these private contracts as well?

8. Is the holding back of a payment request to the government an adequate substitute for prime contractor retention and withholding? What are the purposes of retention and withholding? What other management tools are available to prime contractors to ensure timely and complete performance by subcontractors? Are they adequate?

9. Does Section 7 allow a prime contractor the flexibility to hold back payments to a subcontractor based on legitimate offsets or third-party claims? If not, what problems will this cause?

10. Will Section 7 increase the cost of prime contractor bonds? Will it lead prime contractors to require bonding by subcontractors? What effect will this have on competition for prime contracts and subcontracts on federal construction projects? What effect will it have on the bonding market?

11. Will the government be drawn into the middle of disputes between prime contractors and subcontractors because it is holding the money? Will subcontractors start bringing their payment problems to federal contracting officers?

12. Why does Section 7 apply only to construction contracts? Why does it apply only to the first tier of subcontractors? Will the government be expected to extend its intervention in these areas?

Finally, as far as I am aware, no detailed comments on the possible effects of Section 7 on the federal procurement process have been sought from the federal agencies and contracting experts that must administer construction projects on a day-to-day basis.

For these reasons, I offered an amendment in the Governmental Affairs Committee that would have delayed the implementation of Section 7 for a year to allow the General Accounting Office to study subcontractor payment problems and the need for the provision. I believe that the least we can do before stepping into a private contractural relationship like this is to study the problem and attempt to understand the ramifications of the proposed solution. For this reason, I expect to offer a similar amendment for consideration by the full Senate.

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